

IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1991

PACIFIC MERCHANT SHIPPING ASSOCIATION,
AMERICAN INSTITUTE OF MERCHANT SHIPPING,
OFFSHORE MARINE SERVICE ASSOCIATION,
WESTERN OIL & GAS ASSOCIATION AND
CLEAN SEAS,

Petitioners,

vs.

LLOYD W. AUBRY, JR., LABOR COMMISSIONER,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**MOTION BY THE AMERICAN WATERWAYS
OPERATORS, INC., TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF IN SUPPORT OF PETITIONS
FOR A WRIT OF CERTIORARI**

REED M. WILLIAMS
Counsel of Record
WILLIAMS WOOLLEY COGSWELL
NAKAZAWA & RUSSELL
200 Oceangate, Suite 700
Long Beach, California 90802
(213) 495-6000

*Attorneys for American Waterways
Operators, Inc., Applicant for Leave
to File a Brief as Amicus Curiae*

TABLE OF CONTENTS

| | Page |
|---|------|
| TABLE OF AUTHORITIES | ii |
| MOTION BY THE AMERICAN WATERWAYS OPERATORS, INC., TO FILE <i>AMICUS CURIAE</i> BRIEF AND BRIEF IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI..... | iii |
| BRIEF OF THE AMERICAN WATERWAYS OPERATORS, INC., <i>AMICUS CURIAE</i> , IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI..... | 1 |
| QUESTION OF LAW PRESENTED | 2 |
| INTEREST OF <i>AMICUS CURIAE</i> | 2 |
| SUMMARY OF REASONS FOR GRANTING THE WRIT..... | 4 |
| REASONS FOR GRANTING THE WRIT..... | 4 |
| I. THE NINTH CIRCUIT OPINION UNDERMINES THE WELL-ESTABLISHED PRINCIPLE OF THE UNIFORMITY OF FEDERAL MARITIME LAW..... | 4 |
| II. THE NINTH CIRCUIT OPINION ADVERSELY AFFECTS THE OPERATIONS OF AWO'S MEMBERS AND OTHER MARITIME EMPLOYERS..... | 6 |
| CONCLUSION | 7 |

TABLE OF AUTHORITIES

| | Page |
|---|----------|
| CASES: | |
| <i>Askew v. American Waterways Operators, Inc.,</i> | |
| 411 U.S. 325 (1973) | 3 |
| <i>Miles v. Apex Marine Corp.,</i> | |
| ____ U.S. ___, 111 S.Ct. 317 (1990) | 4 |
| <i>The Lottawanna,</i> | |
| 88 U.S. 558 (1874) | 4 |
| STATUTES: | |
| 46 U.S.C. 8104 | 5 |
| Wage Order 4-80, 8 Cal. Code Regs. Sections | |
| 11040, et seq. | 6 |

No. 91-349

IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1991

PACIFIC MERCHANT SHIPPING ASSOCIATION,
AMERICAN INSTITUTE OF MERCHANT SHIPPING,
OFFSHORE MARINE SERVICE ASSOCIATION,
WESTERN OIL & GAS ASSOCIATION AND
CLEAN SEAS,

Petitioners,

vs.

LLOYD W. AUBRY, JR., LABOR COMMISSIONER,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**MOTION BY THE AMERICAN WATERWAYS
OPERATORS, INC., TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF IN SUPPORT OF PETITIONS
FOR A WRIT OF CERTIORARI**

Applicant, The American Waterways Operators, Inc. ("AWO"), moves the Court for permission to file the attached brief *amicus curiae* in support of both the Petition for Writ of Certiorari filed by Pacific Merchant Shipping Association, American Institute of Merchant Shipping, Offshore Marine

Service Association, Western Oil & Gas Association and Clean Seas (Case No. 91-349) and the Petition for Writ of Certiorari filed by Tidewater Marine Services, Inc., and Western Boat Operators, Inc. (Case No. 91-142) (collectively referred to as "Petitioners"). All of the Petitioners have given consent to AWO to file an *amicus curiae* brief. Respondents, however, have refused to give consent, and therefore AWO is seeking leave to file a brief *amicus curiae* pursuant to Rule 37.2.

AWO seeks leave to file an *amicus* brief because of the far-reaching effect the Ninth Circuit's holding could have on the interests of AWO's members, which are principally coastal and inland tug and barge operators. While Petitioners have adequately presented the legal issues, AWO's members are different entities than those represented by Petitioners and therefore have different interests and concerns that should be brought to the Court's attention and considered in connection with the pending petitions for certiorari.

DATED: September 19, 1991.

Respectfully submitted,

REED M. WILLIAMS

Counsel of Record

WILLIAMS WOOLLEY COGSWELL

NAKAZAWA & RUSSELL

200 Oceangate, Suite 700

Long Beach, California 90802

(213) 495-6000

Attorneys for American Waterways

*Operators, Inc., Applicant for Leave
to File a Brief as Amicus Curiae*

No. 91-349

IN THE
SUPREME COURT OF THE
UNITED STATES
October Term, 1991

PACIFIC MERCHANT SHIPPING ASSOCIATION,
AMERICAN INSTITUTE OF MERCHANT SHIPPING,
OFFSHORE MARINE SERVICE ASSOCIATION,
WESTERN OIL & GAS ASSOCIATION AND
CLEAN SEAS,

Petitioners,

vs.

LLOYD W. AUBRY, JR., LABOR COMMISSIONER,
DIVISION OF LABOR STANDARDS ENFORCEMENT,
DEPARTMENT OF INDUSTRIAL RELATIONS,
STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF THE AMERICAN
WATERWAYS OPERATORS, INC.,
AMICUS CURIAE, IN SUPPORT OF
PETITIONS FOR A WRIT OF
CERTIORARI**

The American Waterways Operators, Inc. ("AWO") respectfully submits this brief as *amicus curiae* in support of both the Petition for Writ of Certiorari filed by Pacific Merchant Shipping Association, American Institute of

Merchant Shipping, Offshore Marine Service Association, Western Oil & Gas Association and Clean Seas (Case No. 91-349) and the Petition for Writ of Certiorari filed by Tidewater Marine Services, Inc., and Western Boat Operators, Inc. (Case No. 91-142) (collectively referred to as "Petitioners").

QUESTION OF LAW PRESENTED

Whether the State of California can regulate the maximum working hours of seamen serving on United States documented vessels operating on the high seas and within state territorial waters off the coast of California?

INTEREST OF *AMICUS CURIAE*

The American Waterways Operators, Inc., is a non-profit national trade organization that has represented the interests of domestic water transportation operators since 1944. Approximately 300 companies, including many coastal and inland tug and barge operators who operate within California coastal waters, are members of AWO.

AWO's objectives and purposes are set forth in its Constitution and Bylaws as follows:

(a) To maintain itself as a strong national association of carriers and act as the unifying body and definitive spokesman for the waterways industry in Washington and, through its field staff, around the country.

(b) To inform the Federal government and the media of the

Association's position on issues and to effectively influence the decisionmakers.

(c) To keep the members, Board of Directors and Executive Committee fully informed on all matters involving Congress, Federal departments and agencies, and other public and private entities that affect the industry and the Association's ability to achieve its objectives.

(d) To carry out the policies of the Association.

In furtherance of these objectives, AWO has been involved in the formulation of maritime legislation and in the development of maritime case law for over forty-five years. AWO has participated in proceedings before this Court, both as an *amicus curiae* and as a party. *E.g., Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

AWO only participates as *amicus curiae* when important issues of maritime law that may substantially affect its members are at stake. As AWO believes that the present case involves legal issues that could have far-reaching effects both on the uniformity of maritime law throughout the United States and on its members who operate in California and other states within the Ninth Circuit, AWO supports the Petitions for Writ of Certiorari in Case Nos. 91-349 and 91-142.

SUMMARY OF REASONS FOR GRANTING THE WRIT

The Ninth Circuit's majority opinion held that California could properly apply its land-based overtime regulations to maritime employers operating on the high seas and coastal waters off of California. This decision not only controverts longstanding federal maritime law that prohibits state regulations that destroy or interfere with the uniformity of maritime law, but it also adversely impacts the maritime industry in California and other Ninth Circuit states. And because tugboat and barge operations are interstate, they will be especially affected by the inconsistency of maximum hour regulations among the West Coast states and the costs and burdens associated with California's overtime regulations.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT OPINION UNDERMINES THE WELL-ESTABLISHED PRINCIPLE OF THE UNIFORMITY OF FEDERAL MARITIME LAW

It is a longstanding principle of American jurisprudence that federal maritime law be uniform throughout its states. United States Supreme Court cases as far back as 1874 (*The Lottawanna*, 88 U.S. 558 (1874)), and as recent as 1990 (*Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317 (1990)), have recognized that state law should not defeat or interfere with the uniformity of maritime law. Yet, if allowed to stand, the majority decision by the Ninth Circuit would allow the State of California to impose overtime compensation requirements that would destroy the very uniformity that this Court has declared must exist in federal maritime law.

Currently, AWO's tugboat and barge operator members are subject to federal maritime law and Coast Guard regulations with respect to the maximum allowable number of hours worked by their crewmembers. For example, governing federal statutes specify that captains "may not work for more than 12 hours in a consecutive 24-hour period except in an emergency." 46 U.S.C. 8104(h). Tugboat captains therefore work a six-hour watch, rest for six hours, work six hours again and then rest six hours. A relief captain will work the intervening six-hour watches. The captains, as well as other crewmembers, remain on the tugboat for several weeks at a time as it travels up and down the West Coast or to Alaska and Hawaii, and then fly home for a period of uninterrupted vacation, usually at least two weeks in duration.

These hour requirements are uniform throughout the United States, so that companies whose tugboats or barges operate up and down the West Coast are subject to the same maximum hour requirements regardless of which state their vessels happen to be in during a work day or work week. However, if California is allowed to impose its overtime provisions to tugboat and barge companies operating off of the coast of California, this uniformity will be destroyed. Indeed, a tugboat captain whose one month journey begins in California and ends in Oregon will have to be paid by one set of standards during the days and hours spent off the coast of California and another set of standards during the time spent off of Oregon.

II. THE NINTH CIRCUIT OPINION ADVERSELY AFFECTS THE OPERATIONS OF AWO'S MEMBERS AND OTHER MARITIME EMPLOYERS

This destruction of uniformity that will result if California applies its land-based regulations to maritime employers will have an adverse effect on tugboat and barge operators and the entire maritime industry in California and other Ninth Circuit states. On its face, the regulation in question (Wage Order 4-80) pertains to land-based professional, technical, clerical and mechanical employees who traditionally work a 9-to-5 workday five days a week. As explained above, tugboat and barge employees traditionally work a twelve-hour day for weeks at a time. Accordingly, the imposition of Wage Order 4-80 on maritime employees, such as tugboat and barge operators, is not only inappropriate but also onerous.

Tugboat and barge operators will be required to either pay substantial amounts of overtime (at least four hours a day per employee) to employees while working in waters off of the coast of California or restructure their staffing schedules by hiring a third employee to do what two employees are normally able to accomplish in 24 hours. Neither option is practical in the maritime industry, where vessels are moving worksites. For example, employers would have to keep track of where the vessel was located at a certain hour when calculating overtime or restaffing crews. Moreover, given the size constraints of tugboats, the hiring of additional standby crew is burdensome and onerous.

CONCLUSION

The application of California's overtime compensation regulations to tugboat and barge operators and other maritime employers would not only destroy the longstanding uniformity of maritime law but also would adversely impact the maritime industry. AWO believes the Ninth Circuit's majority opinion is contrary to decisions of this Court, and it therefore supports the writs of certiorari filed by Petitioners in Case Nos. 91-349 and 91-142.

DATED: September 19, 1991.

Respectfully submitted,

REED M. WILLIAMS
Counsel of Record
WILLIAMS WOOLLEY COGSWELL
NAKAZAWA & RUSSELL
200 Oceangate, Suite 700
Long Beach, California 90802
(213) 495-6000

*Attorneys for American Waterways
Operators, Inc., Applicant for Leave
to File a Brief as Amicus Curiae*